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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 178

DEPEW PAVING COMPANY, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Depew Paving Company, Incorporated, by its attorneys, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Claims to review a summary judgment of that court entered April 8, 1952.

Opinions Below

The opinions of the United States Court of Claims are not as yet officially reported. They appear in the record at pages 27 and 31.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, §1255(1) of the United States Code, 62 Stat. 928, c. 646, June 25, 1948, and Section 6 of the War Contract Hardship Claims Act, known as the Lucas Act, 60 Stat. 902, as amended by 62 Stat. 869, 41 U. S. C. §106 note.

Question Presented

The petitioner and its joint venturer had several contracts for war work with the United States during World War II. It sustained a net loss on these contracts. On August 18, 1944, the petitioner wrote a letter to the Civil Aeronautics Administration setting forth the reasons for its losses and requesting relief. No relief was granted to the petitioner. The Court of Claims in a three to two decision held that the request for relief did not comply with the Lucas Act.

The sole question for decision is:

Did the letter filed by the petitioner on August 18, 1944, with the Civil Aeronautics Administration meet the test of Section 3 of the Lucas Act, which requires that "a written request for relief" be filed with the department or agency involved on or before August 14, 1945?

Statute Involved

The War Contract Hardship Claims Act (known as the Lucas Act), 60 Stat. 902, as amended by 62 Stat. 869, 41 U. S. C. §106 note:

> Sec. 1. "Where work supplies or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or sub-contract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under sec-

tion 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, App., Sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President * * * to consider, adjust and settle equitable claims of contractors * * * for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts, * * *"

Sec. 3. "Claims for losses * * * shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945. * * *"

Sec. 6. "Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition to the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court under this section may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory act

(June 25, 1948) be transferred to the Court of Claims for original disposition in that court."

Statement

The petitioner, as a joint venturer with John B. Schultz Contracting Co., Inc., on July 14, 1942, entered into a contract with the War Department for certain grading, draining and paving work for an airport at Buffalo, New York. The Buffalo airport contract was completed by the joint venture at a net profit. (R. 1-2)

On July 30, 1942, the petitioner and its joint venturer also entered into a contract with the Civil Aeronautics Administration on behalf of the Department of Commerce for the clearing, grading, draining and paving of an airport at Dunkirk, New York. In the performance of the Dunkirk contract unusually heavy rains occurred, causing extensive delays. During this period of delay, the Government officials insisted that the joint venturers keep for long periods of time large quantities of their own expensive equipment on this project which could have been used profitably on other contracts. Increased labor costs were incurred and severe losses were suffered from the inability of the joint venturers to put the machinery to profitable use. Thus, the Dunkirk contract was completed by the joint venture at a loss. (R. 1-3, 23-26)

Section 2 of the Lucas Act provides that in arriving at a fair and equitable settlement of claims the Government shall not allow an amount in excess of the amount of net loss on all war contracts.

The Buffalo Airport and Dunkirk Airport contracts were the only two contracts which the petitioner and its joint venturer had with the United States Government between September 16, 1940 and August 14, 1945. The net loss on these two contracts was $99,153.20. The loss was not the result of fault or negligence on the part of the

joint venturers. Under the joint venture agreement the petitioner's share of the profits and losses was 66.07 per cent. Thus, the petitioner's share of the net losses on these two contracts was $65,510.52. (R. 2-3)

On August 18, 1944, the petitioner filed with the Civil Aeronautics Administration, Department of Commerce, (the agency which had negotiated the Dunkirk Contract) a "written request for relief" on its own behalf and that of its joint venturer showing labor loss and equipment loss. (R. 3, 11-12, 37-39) In this request for relief the petitioner explained the losses in the following manner:

> "In the execution of this Contract, we had in use equipment beyond what would be needed under normal conditions. The weather reports in your possession conclusively show that at no time during the execution of the Contract was there sufficient time between rains, to efficiently operate. Our proposal was predicated only on normal conditions, and there was no way for us to definitely know that we would experience continued wet weather." (R. 11)

The petitioner in its letter dated August 18, 1944, called attention to Article 4 of the Contract which stipulated that relief for losses can be obtained for "unknown conditions of an unusual nature". The petitioner then stated in its letter that "we should be recompensed for not only our cash losses but for losses due to the necessity of prolonging the job beyond the time stipulated in the contract". (R. 11)

On February 7, 1947, after passage of the Lucas Act, the petitioner filed a further claim with the Civil Aeronautics Administration in this instance on its own behalf only. (R. 3) It relied on the aforesaid letter of August 18, 1944, as meeting the requirement of Section 3 of the Lucas Act that a written request for relief from losses under the First War Powers Act be filed with a department

or agency of the United States Government on or before August 14, 1945. (R. 11).

The petitioner's further claim was denied in its entirety by the Civil Aeronautics Administration on December 24, 1948, on the ground that there was no evidence that the petitioner had filed a written request for an amendment of its contract, without consideration, under the First War Powers Act. (R. 3, 5-6) Within the six months required by the Lucas Act, on June 24, 1949, the petitioner filed a petition in the United States Court of Claims, to secure relief under the Lucas Act. (R. 1)

The Government moved for summary judgment on the ground that the United States Court of Claims was without jurisdiction contending that the request for relief which the petitioner filed with the Civil Aeronautics Administration on August 18, 1944, does not satisfy the requirements of Section 3 of the Lucas Act. (R. 7-16A) The basis of the Government's position is that this request for relief does not ask for extra-legal relief without consideration under the First War Powers Act, since it makes reference to Article four of the petitioner's contract. (R. 7-16A) In a three to two decision the United States Court of Claims granted the Government's motion for summary judgment. (R. 27-35)

The petitioner's position is that the document containing the request for extra-legal relief need not be in any particular form and that the document must be considered as a whole. Under the established law the only avenue for relief open to the petitioner for the type of losses claimed in the letter was a claim for extra-legal relief under the First War Powers Act. This, the contracting officers of the Civil Aeronautics Administration knew. They should have treated the claim for relief as a prayer for grace and not as a claim as a matter of legal right. (R. 17-20, 23-26)

Reasons for Granting the Writ

I

The United States Court of Claims has decided this case involving an important question of Federal Law in conflict with a decision of this Court in the Case of Fogarty v. United States of America, 340 U. S. 8.

This case involves the proper construction and application of Section 3 of the War Contract Hardship Claims Act (otherwise known as the Lucas Act), Public Law No. 657, 79th Congress, Act of August 7, 1946, Ch. 844, 60 Stat. 902, as amended by 62 Stat. 869, 41 U. S. C. § 106 note. This is an important Federal Law and many cases involving large sums of money are now pending. The final disposition of these cases is dependent upon the proper interpretation of Section 3 of the Lucas Act.

Section 3 of the Lucas Act sets forth the following prerequisites for claims presented thereunder:

> "Claims for losses * * * shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945."

The only decision of this Court passing on the requirements of Section 3 of the Lucas Act is *Fogarty* v. *United States of America,* 340 U. S. 8, 71 S. C. 5, 95 L. Ed. 10 (1950). In that case this Court in elucidating on this requirement set up the guide posts for determining whether a document meets the tests of Section 3 of the Lucas Act with the following observations:

> "* * * Since there is no definition of the term in the Act or regulations, and since the legislative history of the Act does not show that any settled usage of the term was brought to the attention of Congress, no particular form of notice is required. But what-

ever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts."

The holding of the majority of the Court of Claims in the case at bar is in the face of the clearly enumerated principles of this Court in the Fogarty case. The majority opinion in the case at bar holds as follows:

> "We see no suggestion in the plaintiff's letter that it was asking for extra-legal relief. * * *" (R. 30)

This statement of the majority of the United States Court of Claims in the case at bar overlooks completely the controlling facts. Presumably the majority has reference to the fourth paragraph of the petitioner's letter dated August 18, 1944, which calls the attention of the contracting agency to Article 4 of its contract dealing with equitable adjustments for excess cost occasioned by unknown conditions of an unusual nature. The settled law as interpreted by the United States Court of Claims itself holds that Article 4 of the standard government contract which provides for equitable adjustments when "unknown conditions of an unusual nature" are encountered is not applicable to losses resulting from adverse weather conditions in the performance of a contract. *The Arundel Corporation* v. *United States*, 103 Ct. Cls. 688. The government contracting officers are well aware of this rule of law. Thus, the government contracting officers of necessity knew that this reference to Article 4 of the contract was of no avail to the petitioner. From the facts set forth in the letter it was apparent that the only avenue of relief for the petitioner was one as a matter of grace for amendment of the contract without consideration.

Judge Howell in the dissenting opinion in the case at bar

(in which Chief Judge Jones concurs) has pointed up in such crystal clear language the conflict between the decision of the majority in the case at bar and the interpretation of Section 3 of the Lucas Act by this Court in the *Fogarty* decision that we shall quote from his dissent at length. In demonstrating that the holding of the majority was contrary to the decision of this Court in the *Fogarty* case, Judge Howell observes:

> " • • • I do not believe that under the *Fogarty* decision any particular form of notice by a claimant under the Lucas Act is required so long as the notice is sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of its war contract. In my opinion the letter of August 18, 1944, was sufficient when read as a whole, to apprise the Civil Aeronautics Administration that it was being asked to grant extra-legal relief. I say this because I believe that a contracting agency, such as the CAA, was sufficiently familiar with the standard form of government contract to know that delays caused by adverse weather are specifically stated by that contract to be justification only for an extension of the performance time and are not, either by terms of the contract or the decisions of the courts, a reason for granting the equitable adjustment in price sought by plaintiff. The contracting agency's reply to plaintiff's claim suggests that insofar as plaintiff claimed it was required by the government to keep its idle equipment on the job during bad weather, the claim was one for breach of contract which that agency had no power to consider; and that insofar as the claim was merely a request for additional compensation for losses occasioned by delays due to adverse weather, the claim was an equitable one which might be favorably considered by the Comptroller General and Congress. This reply indicates clearly that the agency was aware that the nature of the claim was at least in part extra-legal despite plaintiff's reference to Article 4 of the contract." (R. 31-32)

In further emphasizing the practical aspects which prove the fallacy of the interpretation of the majority decision in the case at bar, Judge Howell stated as follows:

> " * * * I do not see how we can require more of a contractor that that he put the agency on notice in some manner, of circumstances which might move that agency to exercise its discretion to confer the gratuity authorized by the Act. [First War Powers Act]
>
> "Contractors do not always make their written complaints to contracting officers with a lawyer at their elbows. The usual contracting officer, on the other hand, is not only familiar with the standard form of government contract, but has available, at no expense to himself, the services of attorneys in his agency who are experts in interpreting the meaning of that contract's various provisions. I can conceive of a contractor who has suffered monetary losses through long delays due to unusually bad weather, believing that Article 4 would cover his situation. I believe that the contracting agency in question would know at once that such losses were not compensable under the contract and that the only manner in which monetary relief could be afforded the contractor would be under the discretionary powers conferred on war agencies by the First War Powers Act. If the agency did not choose to grant such equitable relief, I do not think the contractor should be barred from relief under the Lucas Act merely because he mistakenly supposed that his contract covered his situation." (R. 34-35)

A mere reading of the majority and dissenting opinions in this case shows that the United States Court of Claims is split wide open as to the proper interpretation of this important Federal statute. We submit that the holding of Judge Howell (with whom Chief Judge Jones concurred) is correct and that the holding of the majority is in direct conflict with the decision of this Court in the *Fogarty* case.

II

The Decision of the Court of Claims in This Case Involves an Important Question of Federal Law and It is in Conflict with Previous Decisions of that Court.

The prior decisions of the United States Court of Claims held that the substance and nature of the requests for relief (not their form) was controlling as to their sufficiency under Section 3 of the Lucas Act. The majority opinion in the case at bar looks to the form and disregards the substance and nature of the claim for relief.

In *Howard Industries, Inc.*, v. *The United States*, 113 Ct. Cl. 231 (April 4, 1949), the Court of Claims in passing on the sufficiency of certain letters as meeting the requirements of Section 3 of the Lucas Act held:

> "The requirement contained in Section 3 of the Lucas Act that claimants must have filed a written request for relief prior to August 14, 1945, merely means, we think, that claimants must be able to show that they had made timely (that is, prior to August 14, 1945) protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims. * * *"

The Court of Claims has in the case at bar taken a position inconsistent with its decision in the case of *Harry W. Simpson, et al., d/b/a Simpson Construction Company* v. *The United States* (No. 49203, decided Feb. 5, 1952, Petition for Certiorari pending #49, October, 1952 Term). This inconsistency is stated by Judge Howell in his dissenting opinion as follows:

> "We have had occasion in other cases to consider the nature and sufficiency of requests for relief under the Lucas Act. In *Harry W. Simpson, et al., d/b/a Simpson Construction Company* v. *United States*, No.

> 49203, decided February 5, 1952, we concluded that the documents containing the alleged requests for extra-legal relief must be considered as a whole, and that regardless of the manner in which plaintiffs characterized their claims it was the nature of the claim embodied in the request for relief that determined whether or not the resulting loss was cognizable under the terms of the Lucas Act. Thus, I believe that the *Simpson* decision has already disposed of the gist of defendant's contention that plaintiff's characterization of his claim as legal or equitable is determinative of whether or not the requirements of the Lucas Act have been met. * * *" (R. 32)

In illustrating the weakness of the majority's holding in the case at bar, Judge Howell continues:

> "Unless we judge these 'requests for relief' on the basis of the actual nature of the claims presented, I think the results will be unfortunate both for claimants and for the Government. If a claimant's characterization of his claim as contractual or equitable is to control, then a contractor who had a perfectly good contract claim but who waited too long under the terms of his contract to present it as such, may qualify for relief under the Lucas Act if, when he ultimately asked for help, he couched his request in language of grace rather than right. Other contractors, who made claims without reference to their contracts, and whose claims were nevertheless properly considered by the agency as contractual and denied because not established on the facts, could rely on such claims for relief under the Lucas Act." (R. 34-35)

Thus, it is apparent that the proper interpretation of Section 3 of the Lucas Act is presently in a state of confusion. Since the Lucas Act is an important Federal Statute, this confusion should be promptly dispelled by this Court.

III

The decision of the United States Court of Claims in this case is contrary to the Spirit of the Federal Rules of Civil Procedure.

As has been pointed out above, the majority decision in this case has held that the petitioner did not comply with the requirements of Section 3 of the Lucas Act because the *form* of its request for relief was not proper. Admittedly the reasons assigned by the petitioner in its request for relief did warrant the Government officials in granting extra-legal relief only. Thus, the substance of the petitioner's claim for relief is clearly a prayer for grace although the form may be inartistically drawn.

The whole spirit of the Federal Rules of Civil Procedure rebels against any such legalistic construction of statutory rights. The decision of the United States Court of Claims archaically harks back to the days when legal rights were lost on the flimsy thread of failure to comply with strict legal form. This Court should not permit a decision which has such an effect to remain uncorrected.

Conclusion

The writ should be granted.

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